IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 62

NATHAN JACKSON,

Petitioner,

—v.—

WILFRED DENNO, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Argued by
WILLIAM I. SIEGEL

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BRIEF FOR RESPONDENT

Statement

The writ of certiorari is addressed to the United States Court of Appeals for the Second Circuit in review of its decree affirming an order of the United States District Court, Southern District of New York. This order denied and dismissed a petition for the writ of habeas corpus sought by petitioner against respondent as Warden of Sing Sing Prison, New York. Petitioner is incarcerated in that institution pursuant to a judgment of the County

Court of Kings County convicting him of Murder in the First Degree for the killing of William J. Ramos Jr., a New York City police officer, and sentencing him to be executed.

Record History of the Case

The jury which convicted petitioner upon an indictment charging him with Murder in the First Degree of Ramos made no recommendation for mercy. New York's Court of Appeals affirmed the judgment on July 7, 1961 (10 NY 2d 780).

On October 5, 1961 that Court denied a motion for reargument (10 NY 2d 885), but did on the same day grant a motion to amend the remittitur and to certify that upon the argument of the appeal a constitutional question was necessarily presented and decided: to wit, whether petitioner's rights to due process under the Fourteenth Amendment were violated (1) by the use of a coerced and involuntary confession, and (2) by the deprivation of a fair trial through the failure and refusal of the trial Court to instruct the jury that in determining the voluntary nature of the confession they were to consider his physical condition at the time of its making. The Court of Appeals held that there had been no violation of any constitutional right (10 NY 2d 816).

On February 22, 1962, the Court of Appeals denied a further motion for reargument (11 NY 2d 798).

In the meanwhile and on December 18, 1961, this Court had denied a petition for the writ of certiorari (368 US 949).

There then followed the petition for the issuance of the writ of habeas corpus which was denied without a hearing by the United States District Court for the Southern District of New York (Dawson, D.J.) (206 Fed. Supp. 759). The petition was sought pursuant to the provisions of Title 28, United States Code, Sections 2241 *et seq.* The District Court, however, (Dawson, D.J.) did on June 14, 1962 grant a certificate of probable cause and leave to appeal *in forma pauperis* from the order of denial.

The District Court order of denial and dismissal was unanimously affirmed by the United States Court of Appeals for the Second Circuit on November 2, 1962 (Lombard, C.J. and Moore and Marshal, C.JJ.) (309 F 2d 573).

The present petition for the writ of certiorari was granted by this Court on January 21, 1963 (9 L. Ed. 2d 538).

Questions Presented

Petitioner contends

I. That the procedure employed by New York to determine the voluntariness of a confession—by leaving to the trial jury the ultimate factual determination of that question—violates the Fourteenth Amendment and therefore vitiates a judgment of conviction based either in whole or in part upon the confession.

It is our answer that this procedure, time-hallowed in New York's practice, is sanctioned by this Court and offends neither the Fourteenth Amendment nor any other constitutional provision.

II. That in the case at bar one of the confessions interposed in evidence against him was involuntary as a matter of law and that therefore its reception in evidence vitiates the judgment of conviction.

It is our answer that upon the evidence received at the trial the confession was completely voluntary. Therefore, no error was committed in its admission on the trial and its consideration by the jury.

III. That the District Court erred in denying and dismissing the petition for the writ of habeas corpus without a hearing *de novo* and that the Court of Appeals erred in sanctioning such practice.

It is our answer that the procedure followed by the District Court and the Court of Appeals was proper and that nothing decided by this Court in *Townsend* v. *Sain*, 372 US 293, required that a hearing *de novo* be held.

Record Facts Material to the Questions Presented

In the early morning hours of June 14, 1960 (55)*, petitioner, armed with a deadly firearm, entered a Brooklyn hotel admittedly for the purpose of commiting a robbery therein (66)**. When the crime was completed and as he emerged upon the street, he was met by Patrolman Ramos. A struggle ensued (69, 100) during which Ramos finally succeeded in pulling his gun from his holster (101), and

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*, References herein are to pages of the transcript of record printed under the direction of the Clerk of the Court.

** He was accompanied by Nora Elliott, a co-defendant on the trial. She pleaded guilty to and was convicted of the crime of Manslaughter in the First Degree. Her participation in the crime raises no question material to the case at bar and no references will therefore be made to her.

shooting petitioner. Unfortunately, petitioner's simultaneous wounding of the police officer resulted in the death for which petitioner was indicted and convicted.

Petitioner then commandeered a taxicab in which he was driven to the Cumberland Hospital in Brooklyn for treatment and operation necessitated by abdominal wounds (113).

Detective John Kaile arrived at the hospital about 2:00 A.M. and petitioner, in response to a question as to his name, answered: "Nathan Jackson, I shot the colored cop. I got the drop on him" (35). Kaile testified that Jackson was not at that time in a weakened conditioned, but on the contrary was "strong" and answered questions without requesting a postponement (39).

The District Attorney was thereafter notified of petitioner's presence in the hospital and at about 3:55 A.M. his representative, Saul Postal, accompanied by stenographer Vito Lentini, arrived and took a record of Mr. Postal's examination of petitioner, in which the latter, although denying that he had gone to the hotel to commit a robbery (55), admitted the ultimate perpetration of the crime (56), the subsequent encounter with Officer Ramos and the wounding of the officer (57) either at the same time or after petitioner himself had been shot by Ramos. As petitioner graphically described the encounter: "I beat him to it." In this statement petitioner also recited the fact of his cab trip to the hospital (57).

We have noted the fact that the questioning by the District Attorney commenced "at about 3:55 A.M." At 5:00 o'clock in the morning an operation was begun upon petitioner which was completed at 8:00 A.M. (116). As a pre-

operative procedure, demerol and scopolamine were administered to him at 3:55 A.M. (118). While demerol has the effect upon a patient of making him "dopey", the effect is not immediate. Doctor George Suarez testified: "Well, it manifests its action about fifteen minutes after it is injected" (118). And this is a constant effect,—except in the case of children,—regardless of the physical condition of the patient (119) and even as respects a person who had been shot through the liver and who had lost 500 cc's of blood (120).

It is of course the concurrence in point of time of the administration of these drugs, demerol and scopolamine, with petitioner's questioning by the District Attorney which serves as the foundation of his argument that this statement,—a confession of premeditated murder, and so viewed by the jury,—was, because of petitioner's drug-induced mental condition at the time of its making, involuntary as a matter of law. We shall later in this brief elaborate upon the answer which we now make only in short: that the uncontradicted testimony given by Dr. George Suarez (113, 118-120) on this issue completely, and adversely to petitioner, disposes of the issue both factually and as a matter of law.

POINT I

The Fourteenth Amendment does not require that the Judge in a State criminal trial determine as a question of fact whether or not a confession is involuntary. It is in full accord with the due process clause of the Fourteenth Amendment that New York juries ultimately decide this question.

The manner in which appellant's brief presents this question requires us to re-state New York law on the subject.

New York's procedure for determining the voluntariness of a confession is provided by two sections of the Code of Criminal Procedure. Section 417 directs that:

> "The Court must decide questions of law which arise in the course of the trial."

Section 419 directs that:

> "On the trial of an indictment for any other crime than libel, questions of law are to be decided by the Court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court."

For decades it has been law in New York that only where the evidence of coercion and compulsion is so clear that reasonable men cannot reasonably differ concerning the existence of these impermissible factors does the trial Court rule as a matter of law that the confession, being the product of coercion, is therefore constitutionally inadmissible upon the trial. Where there is a conflict of evidence concerning volun-

tariness, the solution of which requires an assessment of credibility of witnesses pro and con, the confession may be admitted into evidence and the question left to the jury with a direction to reject it if on the evidence they are satisfied that its making was not the voluntary act of the defendant. *People* v. *Cassidy*, 133 NY 62; *People* v. *Stielow*, 161 NY 599; *People* v. *Roach*, 215 NY 592; *People* v. *Trybus*, 219 NY 18; *People* v. *Doran*, 246 NY 409; *People* v. *Weiner*, 248 NY 118. In addition to the question of voluntariness, and also constituting a question of fact for the jury's solution, is that of the truth of a confession (*People* v. *Elmore*, 277 NY 397). It is within the province of the jury to assess the credibility of the witnesses whose testimony on these issues it considers. *People* v. *Brengard*, 265 NY 100; *People* v. *Seidenshner*, 210 NY 341; *People* v. *Eng Hing*, 212 NY 373; *People* v. *Seppi*, 221 NY 62. New York's trial Judges may not make themselves in any case into triers of the fact in a jury trial (*People* v. *Ohanian*, 245 NY 227), and it is error for a Judge even to intimate an opinion concerning the truthfulness of witnesses (*People* v. *Viscio*, 241 App. Div. 495).

This long standing rule has but recently been reaffirmed by the Court of Appeals in two cases.

In *People* v. *Lane*, 10 NY 2d 347, it is written:

> "We hold that no error was committed in submitting to the jury, under proper instructions, the voluntary nature of the confessions, although obtained after removal from the County jail and during a delay in arraignment (Roger v. Richmond, 365 US 534; Stein v. New York, 346 US 156, 187-188). Admissibility of confessions is a matter of State procedure (Roger v.

Richmond, supra, p. 543). Nothing in Mapp v. Ohio, 367 US 643, is to the contrary."

Froessel, J. in *People* v. *Rodriguez*, 11 NY 2d 279, 288 wrote:

> "The general rule, which has been repeatedly adhered to in the decisions of this court, is that the voluntariness of a confession is a question of fact for the jury. The facts that a defendant was illegally arrested (Balbo v. People, 80 NY 484), detained for an unlawful period of time prior to arraignment (People v. Vargas, 7 NY 2d 555), improperly removed from a county jail for further questioning (People v. Lane, 10 NY 2d 347), deceived into confessing (People v. Everett, 10 NY 2d 500), or allegedly coerced or beaten into confessing (People v. Bloeth, 9 NY 2d 211), have all been held to have been merely factors for submission to the jury for their consideration in passing upon the voluntariness of the confession."

Petitioner's central contention on this point is that the procedure thus sanctioned by New York's highest Court is violative of a defendant's constitutional right because its application may result in the reception in evidence against him of a confession which is in fact involuntary although the jury has found it to have been freely made. It is argued as a necessary corollary of this premise that only the trial Court should determine the question of voluntariness,—and this as a matter of law.

For this contention, petitioner cites no judicial authority. His reliance rests upon treatises and legal magazine articles: Meltzer, "Involuntary Confessions: The Alloca-

tion of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 104-05 (1956); 3 Wigmore, Evidence, Section 861 (3d ed. 1940); McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239, 251 (1946); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165-89 (1929).

It is we, submit, neither a reflection on the status of these authors, which we certainly do not intend, nor an inaccurate analysis of their position for us to say that their attitudes are all based upon an underlying and pervasive, and at the same time unjustified, disbelief in the efficacy of the jury system, in turn grounded upon their equally unjustified doubt of the ability of lay jurors to decide important questions of fact. This doubt is clearly expressed by Dean Morgan in his treatise "Some Problems of Proof • • •" (p. 104):

> "The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, *and regardless of the pious fiction indulged in by the courts, it is useless to contend that a juror who had heard the confession can be uninfluenced by his opinion of the truth or falsity of it.*

> Neither the due process clause of the Federal Constitution nor any other of its provisions requires any particular division of function between Judge and jury. The result is that in New York and a few other jurisdictions the orthodox rule has been abandoned in the one situation where it is most needed. The rule excluding the coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning, that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every Judge and lawyer knows, cannot be obeyed."

The assumptions inherent in this argument,—nay, not inherent but indeed expressed,—are (1) that a juror is necessarily and inevitably prejudiced by the mere hearing of a confession and prejudiced to the point where he cannot even consider the evidence pointing to its involuntary character no matter how strong that evidence may be; and (2) that jurors will not in this one instance of trial procedure feel bound by their oath of office which requires them to follow and obey the Court's instructions on the law.

It is our submission that if to jurors can be left the ultimate and awesome duty and power to decide the question of innocence or guilt, there can be constitutionally devolved upon them the power and duty to find the answers to all intermediate questions of fact, including even that of the voluntariness of a confession.

This Court has in *Leland* v. *Oregon*, 343 US 790, rehear. den. 344 US 848, thus expressed the same thought:

> "Juries have for centuries made the basic decision between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so."

We add,—probably unnecessarily,—the additional statement: there is a logical inconsistency in the argument that a trial Judge's examination of the question of voluntariness is superior to an examination of the question made by a jury. The jury's consideration of the problem is in New York conducted under the guidance of the same rule of relevance as the Court would impose upon itself if it were the trier of this fact. There is no reason in experience to believe that the jury would not follow these rules. On the contrary, it is a presumption of law that the jury does obey and is guided by the Court's instructions (*People* v. *Lobell*, 298 NY 243, 254; *People* v. *Guardino*, 286 NY 132, 135).

And finally, possibility of error by the jury no more leaves a defendant without recourse than does the possibility of the same error by the trial Court. It is the function of an appellate court to cure error. That such appellate recourse is open to New York defendants needs no further proof than the record of this very case.

It is not a matter of surprise that petitioner cannot call to the aid of his argument of unconstitutionality the support of judicial authority in this or any other Court. On the contrary, this Court has sanctioned New York's procedure in *Stein* v. *New York*, 346 US 156. In *Stein*, p. 172, Jackson, J. wrote:

> "The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but does not permit the Judge to make a final determination that a confession is admissible. He may—indeed, must—exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. People v. Weiner, 248 NY 118, 161 NE 441. The Judge is not required to exclude the jury while he hears the evidence as to voluntariness, People v. Brasch, 193 NY 46, 85 NE 809, and perhaps is not permitted to do so, People v. Randazzio, 194 NY 147, 159, 87 NE 112, 117."

In answer to the contention that the jury's general verdict of guilt leaves shrouded in doubt the entire question of their decision on the issue of voluntariness, Jackson, J. wrote (179):

> "The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.

> The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. (Citing). Many states emulate the New York practice while others hold that presence of the jury during preliminary hearing is not error. Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom."

Petitioner's brief (p. 7) says that:

> "The Stein aberration has been very severely criticized in the legal literature on the ground that it does not satisfy the Constitutional requirement of due process."

That "legal literature" (Professor Edmund Morgan *et als.;* this brief, p. 9), as we have seen, offers no more support for its argument than its basic, and basically unjustified, distrust of the jury system. The real *Stein* "aberration",—and the choice of epithet is petitioner's and not ours,—lay in that portion of the majority opinion of which Frankfurter, J. wrote in dissent (p. 201):

> "Unless I am mistaken about the reach of the Court's opinion, and I profoundly hope that I am, the Court now holds that a criminal conviction sustained by the highest court of a State, and more especially one involving a sentence of death, is not to be reversed for a new trial, even though there entered into the conviction a coerced confession which in and of itself disregards the prohibition of the Due Process Clause of the Fourteenth Amendment. The Court now holds that it is not enough for a defendant to establish in this Court that he was

> deprived of a protection which the Constitution of the United States affords him; he must also prove that if the evidence unconstitutionally admitted were excised there would not be enough left to authorize the jury to find guilt."

Or as Douglas, J. wrote (p. 204):

> "But now it is said that if prejudice is not shown, if there was enough evidence to convict regardless of the invasion of the citizen's constitutional right, the judgment of conviction must stand and the defendant sent to his death."

In so far as *Stein* was either intended by the majority, or understood by the minority, of this Court to have announced that doctrine, it is now clear that its departure from the current of constitutional law evolved by this Court from the time of *Brown* v. *Mississippi*, 297 US 278, on in 1936, does not represent current law. *Payne* v. *Arkansas*, 356 US 560, *Spano* v. *New York*, 360 US 315 and *Lynumm* v. *Illinois*, 372 US 528, have made it abundantly clear that the reception in evidence against a defendant of a coerced confession vitiates his conviction regardless of the plenitude of evidence of guilt *aliunde*.

Stein's approval of the New York jury procedure anent the problem of confession-voluntariness has had tacit approval in the Court's latest reference thereto in *Roger* v. *Richmond*, *supra*, where it is written (Headnote 9, p. 769):

> "Determination of the admissibility of confessions is, of course, a matter of local procedure."

Nor can it be argued that this Court did not have the question before it. It pointed to the fact (p. 771) that:

> "In Connecticut the jury plays no part in determining the voluntariness of a confession. Connecticut follows the orthodox rule of leaving the determination of admissibility exclusively to the trial judge."

It then wrote:

> "Compare Stein v. New York, 346 US 156, 97 L'ed 1522, 73 S Ct 1077. If a confession is admitted, the jury is left to weigh its truthfulness as it weighs other evidence."

We deem it proper to point out that since the adjudication of *Stein*, this Court has passed upon *Spano*, in which the procedure respecting the reception in evidence of confessions was identical with that now under review. True, the Court reversed the judgment of conviction upon the facts, holding that the confessions were in actuality the product of coercion. Nevertheless the Court did not question the constitutionality of the procedure for determination of the facts.

We may also allude to the fact that the New York procedure is identical with that followed in some of the Federal Circuits. *Patterson* v. *United States*, 183 F 2d 687; *United States* v. *Lustig*, 163 F 2d 85, where Hand, C.J. wrote for the First Circuit:

> "In the case of the ordinary confession, its trustworthiness is for the jury even if the Judge admits the confession."

Denny v. *U. S.*, 151 Fed. 2d 828 (4th C.C.A. 1945);
Alderman v. *U. S.*, 165 Fed. 2d 622 (D. C. App. 1947);
Tyler v. *U. S.*, 193 Fed. 2d 24 (D. C. App. 1951);

Duncan v. *U. S.*, 197 Fed. 2d 935 (5 C.A. 1952);
Smith v. *U. S.*, 268 Fed. 2d 416 (9 C.A. 1959).

Finally, we point to New York's own constitutional provision, Article 1, Section 2, which guarantees to a defendant in a capital case a trial by jury. Only constitutional considerations of the utmost weight, we submit, would justify holding that this State constitutional provision violated the Due Process Clause of the Fourteenth Amendment. *Stein* v. *New York, supra; Roger* v. *Richmond, supra; Leland* v. *Oregon, supra,* and reason and principle themselves establish that there is totally lacking any such constitutional necessity.

POINT II

Petitioner's confession was in fact and in law voluntary.

Absent from the case at bar are those factors of physical brutality and mental coercion which form the usual content of the cases which have passed in review before this Court. Appellant argues that the circumstances of the case: his wounded condition, in turn aggravated by the administration, in combination, of the drugs demerol and scopolamine nevertheless create an issue of voluntariness. It is an unnecessary argument, since we freely concede that if his physical condition was such as to have made mere questioning itself a form of mental compulsion the confession would in law be an involuntary one. Certainly we concede that if the drugs had bereft him of mental controls with the effect that his answers were not truly the product of a conscious mind, the same fatally infectious quality would inhere in

the confession. It is beyond argument that since this Court's decision in *Townsend* v. *Sain*, 9 L. Ed. 2d 770:

> "It is difficult to imagine a situation in which a confession would be less the product of a free intellect less voluntary, then when brought about by a drug having the effect of a 'truth serum'."

The key words in this Court's decision, however, were obviously "than when brought about by a drug."

The nub of the instant case on this point is the fact that in the record of the trial there is not one item of evidence which even suggests that either petitioner's wounded condition or the administration of demerol and scopolamine affected his ability to make a voluntary and reasoned confession.

The Court below accurately analysed the record in its disposition of the physical-condition-aspect of the case (30 seq.).

> "The facts surrounding the giving of appellant's statement are undisputed with one exception. The so-called statement or confession was given over a period of five minutes (3:55 AM-4:00 AM) and consisted of questions by an assistant district attorney and answers by appellant. No claim was made by appellant that any physical force was used or threatened or that the statement was the result of deception, ruse, false promises or guile. The questioning was not conducted in a police station with the potentially menacing presence of many police officers or conducted over an interminable period by a series of inquisitors. To the contrary the statement was given to a stenographer in a hospital room where appellant was in bed. The only dispute in testimony is found

> in appellant's claim that if he wanted some water ("They gave me some water once") he could not have it until he answered the questions 'the way they wanted me to answer them'. In contradiction, the stenographer, a nurse's aide and a practical nurse who were present, all testified that no such conditions were imposed. The testimony was that the refusal of more water was because of the mandatory requirement (fol. 43) of no food or water to any patient at such a pre-operative stage.
>
> With the entire state court record before us, the court is clearly convinced that there are no facts which tend to show that the appellant's statement was 'not freely self-determined'. The court is buttressed in this conviction by the fact that appellant took the stand and recited at length and with the greatest particularity the events of June 13 and 14th, 1960. Had any coercion, physical or psychological, been exerted, would he not have been the first to mention it? Yet the only intimation of any inducement to answer questions are the flatly contradicted 'more water' and the wanting to be 'left alone' claims."

When the Court below turned its scrutiny to the drug factor, its analysis was equally cogent (31):

> "The reliance which appellant places upon the injection of demerol as possibly causing a 'loss of willpower' is not well founded. His hypothesis is 'if the drug—had taken effect at the time he confessed—.' The undisputed proof was that any effect would not have commenced until at least ten minutes after the statement had been concluded. Although appellant had full opportunity to offer proof to the contrary if such existed, he did not do so. Griffith v. Rhay, 9 Cir., 1960, 282 F. 2d 711, although it discussed demerol which had been frequently administered to the defen-

> dant there for several days before he gave his statement, was decided upon the specific ground of the defendant's right to the assistance of counsel. The findings of the district court that oral admissions and the signed confession 'were the result of his free and voluntary act' were not the basis of the reversal."

We do not mean to suggest that this Court is bound by the fact-finding of the Court below, or of the New York Courts. We recognize the constitutional duty of this Court under the Fourteenth Amendment to make its own independent survey of the record and to reach its own independent conclusions concerning the voluntariness of the petitioner's confession. However, it is pertinent to quote Jackson, J. in *Stein, supra*:

> "Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a super-jury, should find that the confessions were coerced. *This misapprehends our function and scope of review*, a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.
>
> Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment

> does not, in guaranteeing due process, assure immunity from judicial error. (citing). *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.*
>
> It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. *Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.*
>
> A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried* and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect." (Italics ours)

Frankfurter, J. succinctly expressed the same standard of assessment in *Fikes* v. *Alabama,* 352 US 191, 199:

> "A state court's judgment of conviction must not be set aside by this Court where the practices of the prosecution, including the police as one of its agencies, do not offend what may fairly be deemed the civilized standards of the Anglo American World."

In *Townsend, supra,* this Court wrote:

> "Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible because coerced."

The principle is clear in statement. The difficulty which Courts have experienced with it has been in its application to differing states of fact. We could here, after parading the array of cases in which the Court has sustained State judgments of conviction based in whole or in part upon confessions (*Lisemba* v. *California,* 314 US 219; *Lyons* v. *Oklahoma,* 322 US 596; *Gallegos* v. *Nebraska,* 342 US 55; *Stroble* v. *California,* 343 US 181, re-hear. den. 343 US 951; *Stein* v. *New York, supra; Brown* v. *Allen,* 344 US 443; *Thomas* v. *Arizona,* 346 US 39; *Cicenia* v. *LaGay,* 357 US 504; *Ashdown* v. *Utah,* 357 US 426), analyze their facts and urge upon this Court that their similarity to the case at bar makes them relevant, cogent and determinative authority for the affirmance of the findings of the Court below and of the New York Courts. We realize, however, that each case is of necessity *sui generis;* and so realizing, we believe that it would be of no service to the Court to encumber this brief with detailed analysis. We therefore do no more than cite them in the belief that the Court's familiarity with them will bring to the Court's mind, not an identity of fact which can never exist, but a similarity of fact which is not unimportant in the consideration of the instant case.

Finally, we turn again to *Townsend* v. *Sain, supra,* and this Court's statement:

> "The Federal District Judges are more intimately familiar with State criminal justice, and with the trial of fact, than are we and to their sound discretion must be left in very large part the administration of Federal habeas corpus."

The case at bar is an excellent example of the proper employment by both District Court and the Court of Appeal of "their sound discretion" in "the administration of Federal habeas corpus."

Both Courts acted in admirable obedience to this Court's direction in *Brown* v. *Allen*, 344 US 443 that:

> "The decisive and serious responsibility of compelling State conformity to the Constitution by overturning State criminal convictions should not be exercised without clear evidence of violation."

POINT III

The District Court acted with legal propriety in denying the petition upon the basis of the record of trial in the State court.

Petitioner contends that the District Court erred in not holding a hearing and taking testimony thereon concerning his physical condition when he confessed to the District Attorney.*

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* We advert to the fact that petitioner made two statements in the nature of confessions. The first was that made to Detective Kaile at 2:00 A.M. on June 14, 1960 and the other was the later one to the District Attorney beginning at about 3:55 A.M. For purposes of clarity, we express our certainty that the voluntariness and legal propriety of the earlier statement is not in issue here. Appellant's brief throughout, and particularly in its Point III, makes frequent references to the second confession and nowhere, except as a historical fact, does it refer to or argue about the first.

The issue presented to the District Court, identical with that raised at the State trial, was that of appellant's physical condition, caused by bullet wounds in his liver and lungs and of his mental condition as well. It was, as now, contended that he was in great pain and had suffered much loss of blood, had been deprived of water and had been subjected to a combined application of demerol and scopolamine (the former a preanesthetic narcotic)—all at a time, and with the effect of, rendering him incapable of making a truly voluntary confession.

The District Court considered itself authorized by this Court's opinion in *Brown* v. *Allen*, 334 US 443, to reach a decision on the petition by the employment of the State trial record and without an independent hearing *de novo*. The District Court wrote (3):

> "Where the record affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and such consideration is given to the entire state record, there is no necessity for having a hearing on the application for a writ of habeas corpus."

The Court of Appeals obviously approved this procedure and upon its review of the District Court's order, also "examined the entire State record" (30). There can be no doubt that prior to this Court's decision in *Townsend* v. *Sain, supra*, the procedure of the District Court and the Court of Appeal was authorized by *Brown* v. *Allen*. This Court wrote in *Brown* (463):

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the

writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing is presented, a repetition of the trial is not required. See p. 488, supra. However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. See p. 483, supra. Moore v. Dempsey, 261 U.S. 86, 67 L ed 543, 43 S Ct 265. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. Cf. 28 U.S.C. Sec. 2244. See note 15, supra. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See White v. Ragen, 324 US 760, 764, 89 L ed 1348, 1352, 65 S. Ct. 978."

The Court also furnished District Courts with an important guide to their evaluation of the State Courts' determination of fact (456).

"B. Effect of State Court Adjudications.—With the above statement of the position of the minority on the weight to be given our denial of certiorari, we turn to another question. The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Mooney v. Holohan, 294 U.S. 103, 97 L ed. 791, 55 S. Ct. 340, 98 A.L.R. 406; Ex parte Hawk, 321 U.S. 114, 88 L ed. 572, 64 S. Ct. 448. *Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue.* Malinski v. New York, 324 U.S. 401, 404, 89 L ed. 1029, 1032, 65 S. Ct. 781. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata." (Italics ours)

But, argues petitioner, *Townsend, supra,* has in effect overruled *Brown, supra;* at least to the extent that on the facts of the case at bar, a District Court hearing was obligatory as a matter of law.

We disagree with this construction of the *Townsend* decision and confidently assert that what it did was to furnish

guidelines with respect to cases having no resemblance to the one at bar. The Court wrote (786):

> "We hold that a Federal Court must grant a evidentiary hearing to a habeas applicant under the following circumstances: if (1) the merits of the factual dispute were not resolved in the State hearing; (2) the State factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by a State Court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the State Court hearing; or (6) for any reason it appears that the State trier of fact did not afford the habeas applicant a full and fair fact hearing."

The facts of the instant case come within none of these classifications. Thus, the merits of the "factual dispute" concerning the voluntariness of petitioner's confession were "resolved" at the State trial by the ultimate finding of guilt. Again, the "State factual determination" is "fairly supported by the record as a whole". Petitioner's claim of physical and mental incapacity were passed upon by the jury in the framework of instructions to which the Federal Court of Appeals paid the tribute of speaking of its "clarity and accuracy" (28). Third, the State trial was certainly "adequate to afford a full and fair hearing" on the issue of voluntariness since New York's procedure offered to petitioner a preliminary voir dire concerning the admissibility of the confession. It is, as the Court of Appeals found, immaterial that here no voir dire examination was held. As the Court below held (31):

> "* * * the absence of such a hearing in this case is not error, since counsel for the defendant was asked explicitly whether he objected to use of the confession and he replied explicitly that he did not." *

It cannot be successfully argued that petitioner makes "a substantial allegation of newly discovered evidence". What he does in this Court, as he did in the Courts below, is only to suggest the existence of medical learning which was, however, in existence at the time of the State trial and which could have been availed of by the defense in the form of expert testimony. (We shall in a moment demonstrate both why defense counsel decided not to do so and his right as an experienced lawyer so to decide.)

Finally, it is our submission that it was not the "State trier of fact" (within the true meaning of the sixth *Townsend* classification) who "did not offer the habeas applicant a full and a fair fact hearing". Here, as well as with respect to the fifth classification, whatever omissions of fact-development may exist in the record do so exist because of a conscious choice of tactic by defense counsel,—a choice which cannot fairly be criticized.

The substance of petitioner's argument is that because "demerol causes drowsiness and impairs alertness" (his brief, p. 13),—and particularly so when demerol is administered in combination with scopolamine,—the confession contemporaneously made by him to the District Attorney should be held to be involuntary as a matter of law. In support of this contention, in both its medical and legal aspects, he cites in the first instance medical authorities

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* We shall develop more fully the design of counsel's tactic at page 35, *seq.* of this brief.

and in the latter the cases of *Townsend* v. *Sain, supra,* and *Griffith* v. *Rhay,* 282 F. 2d 711, 714 (9th Cir.).

We have read his medical authorities: Rovenstine and Batterman, The Utility of Demerol as a Substitute for Opiates in Preanesthetic Medication, 4 Anesthesiology 126, 132 (1943); Hori and Gold, Demerol in Surgery and Obstetrics, 51 Canadian Medical Association J. 509, 511 (1944); Sollmann, A Manual of Pharmacology and Its Application to Therapeutics and Toxicology, 323-24, 254-55 (7th ed. 1948); 1 Osol, Farrar and Pratt, The Dispensatory of the United States of America 1222-23 (25th ed. 1955). We could content ourselves with the accurate statement that no one of these authorities contains even a suggestion that the narcotic effect of the drugs becomes operative within the five minute period during which the confession was made. We could also point to the fact that Goodman and Gilman in The Pharmacological Basis of Therapeutics, 2d Ed. 1960, 7th printing 1963, do not in their full discussions of the drugs assume to make a categorical statement of the time effectiveness of the drugs. We rather prefer, however, to answer that no generalized discussion, regardless of the eminence of its author, equals in weight and authority the record of the trial herein, of which the Court of Appeals wrote (31):

> "The undisputed proof was that any effect would not have commenced until at least ten minutes after the statement had been concluded."

Petitioner's argument must fail in the face of its characterization by the Court of Appeals (31):

> "His hypothesis is 'if the drug—had taken effect at the time he confessed—'."

Put in another form: the most attractive theory is of minimal importance when weighed against an established fact.

Townsend v. *Sain, supra* and *Griffith* v. *Rhay, supra,* offer petitioner no more support than do the medical citations. In *Townsend,* the confessing defendant, only nineteen years old, was a confirmed heroin addict, having used the drug since age fifteen. He had been given a combined dose of phenobarbital and scopolamine. The nine minute confession of the crime for which he had been convicted had been preceded by twenty-five minutes of questioning (whether concerning this case or on other matters does not appear). Townsend's expert,—a doctor of physiology, pharmacology and toxicology,—testifying in answer to a hypothetical question, assumed as an important aspect of the subject the fact that the person involved was a narcotic addict. Moreover, Townsend was in the opinion of a prosecution witness of "such a low intelligence that he was a mere mental defective and 'just a little above moron'." None of these factors can be attributed to petitioner.

Moreover, it should be remembered that there is in the case a standard of comparison which vouches for the voluntariness of petitioner's confession to the District Attorney. He had made a confessing statement two hours earlier to Detective Kaile, which in essence was similar to the District Attorney's confession. No preoperative narcotics had been administered to him. It is more than mere coincidence that the identity of subject matter exists. On the contrary: the practical identity in meaning and effect of the two confessions is plenary evidence that the later District Attorney's confession was made by a man who was in complete control of his mental faculties. In addition, the internal

evidence of the statement strongly suggests and indeed proves petitioner's clarity of mind. Its completeness and coherence show that it was the speech of a physically competent man.

We turn to *Griffith* v. *Rhay*. There the confession under scrutiny by the 9th Circuit Court of Appeals was made after demerol had already been administered to the confessing defendant sixteen times over a period of four days, and after he had already been operated upon four days before the ultimate questioning. The operation had left him in steady pain up to the very moment of interrogation. Moreover, it was itself so unsuccessful that four additional serious operations were required. It is our submission that the only similarity between *Griffith* and the case at bar is the incidental fact that in both the defendants had been given demerol. Surely, that is too tenuous a circumstance to lend substance to the argument that *Griffith* is authority for appellant's position in this case.

There also exists the basically additional important distinction in the cases. In *Griffith*, there was serious and material contradiction in the medical testimony concerning the effect of demerol even under the circumstances and in the quantity administered to that defendant. In the case at bar the medical testimony concerning petitioner's clarity of mind and freedom of will went uncontradicted.

Finally, as the Court below pointed out (this brief, p. 19), these frequent and major injections of demerol upon the defendant in *Griffith* were not the ground of decision by the reversing Court. The case "* * * was decided upon the specific ground of the defendant's right to the assistance of counsel."

Anent petitioner's general physical condition, the finding of capacity by the Court of Appeals (30-31) leaves no room for the hyperbolic claim (Pet. Br., pp. 10, 11) that his confession was taken by the District Attorney under "degrading and coercive" conditions and when he "lacked power to resist interrogation." We are, we submit, relieved of the necessity of further analysis by that judicial finding confirming the jury's verdict.

We come to what must therefore be petitioner's actual, although unexpressed, argument: that his trial counsel's affirmative decision—not to introduce medical testimony concerning scopolamine and demerol in contradiction to the People's evidence—constituted ineffective representation which entitles him to a re-trial of the confession-issue at a habeas corpus hearing.

We shall assume for the moment that petitioner's trial counsel erred in his judgment and was not without fault in his decision. Nevertheless, petitioner does not even on such basis establish either a case for present intervention by this Court or by the Courts below. All authority denies him such a right.

In *Diggs* v. *Welch, Superintendent D.C. Reformatory*, 148 F. 2d 667, cert. den. 325 U.S. 889, 65 S. Ct. 1576, 89 L. ed. 2002, petitioner based his petition for a writ of habeas corpus on the claim that his Court-appointed attorney "gave him such bad advice through negligence or ignorance in connection with entering his plea that he cannot be said to have been represented by effective or competent counsel". In affirming the order of the United States District Court for the District of Columbia dismissing the petition, the United States Court of Appeals for the District of Columbia wrote:

"There is no allegation that the Court did not select defendant's counsel with care and with due regard for appellant's constitutional right. We must assume that the Court appointed a reputable member of the bar in whom it had confidence. The issue presented on this record, therefore, is whether a prisoner may obtain a writ of habeas corpus on the sole ground that counsel properly appointed by the Court to defend him acted incompetently and negligently during the proceedings.

It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment.

The petitioner here must, therefore rely upon the due process clause of the Federal Constitution which guarantees him a fair trial. But to justify habeas corpus on that ground an extreme case must be disclosed. It must be shown that the proceedings were a farce and a mockery of justice. * * *

For these reasons we think absence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court, or the prosecution to observe it and to correct it. *We do not believe that allegations even of serious mistakes on the part of an attorney are ground for habeas corpus standing alone.* The cases where the Supreme Court has granted habeas corpus on the ground that there was no fair trial support this interpretation of the absence of effective representa-

tion. They are all cases where the circumstances surrounding the trial shocked the conscience of the Court and made the proceedings a farce and a mockery of justice. Measured by the test of these cases the allegations in the petition before us are insufficient to require a hearing." (Italics ours)

Accord:

Cofield v. *United States*, 263 F. 2d 686;
United States v. *Wight*, 176 F. 2d 376, cert. den. 338 U.S. 950.

In *Cofield*, the Court summed up the legal question thus:

"Only if it can be said that what was or was not done by the attorney for his client made the proceedings a farce and a mockery of justice shocking to the conscience of the Court can a charge of inadequate legal representation prevail."

The rule is the same in New York (*People* v. *Tomaselli*, 7 N.Y. 2d, 350, *People* v. *Brown*, 7 N.Y. 2d 359; *People* v. *Girardi*, 2 App. Div. 2d 701). In *Brown, supra*, Fuld, *J.* wrote:

"It would be folly indeed for the courts to sit and hear disappointed prisoners try their former lawyers on charges of incompetent representation. Absent evidence that the trial Judge appointed an attorney who was unfit to defend the accused or that the Judge allowed counsel to continue to act after it appeared that his representation was such as to make the trial a farce and a mockery of justice, the fact, if it was one, that assigned counsel made an error of judgment or of tactics during the course of trial, is an insufficient ground for coram nobis and, this being so, it would be futile to have a hearing."

In *Girardi* the Court wrote:

> "We shall assume that appellant was entitled to reasonably competent counsel. He was not entitled to infallible counsel" (citing, inter alia, *United States* v. *Ragen*, 166 F. 2d 976).

Our assumption of fault, however, is but rhetorical. Actually, petitioner's counsel's choice of tactic was a wise and reasoned one, forced upon him by the plenary proof of petitioner's guilt. The People produced at the trial a number of eye-witnesses to the homicidal shooting. Their testimony proved beyond possibility of successful contradiction that petitioner fatally wounded Ramos in an attempt to escape from the scene of a robbery immediately after its perpetration: a fact indeed conceded by counsel in his summation (133). This would have supported a conviction under the felony murder theory (Penal Law, Section 1044(2)). In that petitioner stood over Ramos as he lay on the ground and then shot him, there was ample proof of premeditated murder which would have justified a verdict of common-law murder in the first degree (137). Counsel, realizing the hopelessness of an attempt to procure an acquittal, devoted almost his entire summation to a plea that the jury should convict petitioner, not of murder in the first degree, but of murder in the second degree or manslaughter. We choose but one example of his explicit plea (132):

> "And let me say at the outset, Mr. Foreman, that I do not ask you to acquit Jackson—I would be more than affectatious if I asked for an acquittal in this case. But I do say, and I am going to argue upon it on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter, and you will get the definition of both of those degrees

> of homicide, which will be charged to you in the case, and the definition of reasonable doubt."

This lawyer, Judge Healy, was no novice in the practice of the criminal law. He had spent upwards of a half a century in the trial and representation of persons accused of crime (27). His experience ran the whole gamut of such practice and had made him the Nestor of the Brooklyn Criminal Bar. Of him the District Court correctly wrote (7):

> "When evidence was introduced at his trial of the statements made by the defendant no objection to the introduction of such evidence was made by his attorney, who was an experienced trial lawyer and a former judge."

The Court of Appeal recognized the wisdom of Judge Healy's choice (27):

> "The summation of appellant's counsel clearly discloses his trial strategy both as to his unwillingness to object to the statement and as to his calling appellant to the stand. He must have been convinced as a result of his almost fifty years of experience that he would serve his client best if he did not 'ask you [the jury] to acquit Jackson' but to argue it 'on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter. . . .' "

The Court of Appeals for the Second Circuit has written on the subject in *United States ex rel. Reid* v. *Richmond*, 295 F. 2d 83 (reversed on other grounds sub nom. *Rogers* v. *Richmond*, 365 U.S. 534). A State defendant convicted of Murder in the First Degree sought the issuance of a Federal writ of habeas corpus because of the reception at the trial of a confession to which his competent assigned coun-

sel did not object and concerning which indeed the defendant himself testified (as did appellant in the case at bar). This Court, in reversing an order which sustained the writ, wrote:

> "Whatever may have been the reasons for the course taken by Reid and his counsel, it was a conscious reasoned choice made by counsel who was experienced in the ways of the criminal law. As such, it amounted to a forfeiture of any right to assert constitutional infirmities in the trial as a result of the admission of the statements (citing). The trial strategy had much to commend it; that it failed does not mean that it was mistaken. In any event, the failure does not entitle Reid to a second chance. Regrettable as hindsight may prove the choice to have been, Reid must be bound by what his lawyers did and his acquiescence in that course in his own testimony (citing cases)."

With but a change in the names of the parties, that which we have quoted above could well have been written in final disposition of the case at bar. It is our submission that the parallel is complete.

POINT IV

The Order of the Court of Appeals should be affirmed.

Dated: Brooklyn, New York
October, 1963

Respectfully submitted,

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